Remedies for Bad Faith Violations

Ba#ak Çal# 2021-10-13T14:01:44

In this blog post, I discuss how the Committee of Ministers (CoM) has developed the Article 18 remedial jurisprudence in the field of individual measures through its monitoring of the execution of Kavala v Turkey and Demirta# v. Turkey No (2) GC. Given that none of the individual measures indicated by the CoM's decisions in these two cases had been executed at the time of writing, I also look at what lies ahead.

Kavala v. Turkey and Demirta# v. Turkey (GC): The Judgments

The European Court of Human Rights (ECtHR) has to date delivered two Article 18 judgments in conjunction with Article 5 against Turkey: a chamber judgment in the case of Kavala, human rights philanthropist and defender, and a grand chamber judgment in the case of Demirta#, former leader of the second largest opposition party in Turkey, the HDP, and former member of parliament. In both cases the ongoing pretrial detentions were the subject matter of Article 18 analysis. In both of the cases, the ECtHR has found that not only were the applicants detained in violation of Article 5 of the European Convention on Human Rights (ECHR), but also that these detentions pursued, *ab initio* and continuously, ulterior political purposes and, therefore, violated Article 18 of the ECHR in conjunction with Article 5.

In Kavala, the Court held that the arrest and extended detention of the human rights defender served the ulterior purpose of reducing him to silence and to create a chilling effect on civil society. In Demirta#, the Court found that lifting parliamentary immunity by way of a constitutional amendment which led to both the detention and criminalisation of Demirta# for his political speech did not meet the 'prescribed-by-law' requirement under Article 10 of the Convention. It further held that the politician's ongoing pre-trial detention served the ulterior motive of stifling pluralism and limiting freedom of political debate in Turkey. Significantly, in a rare move, the Court ordered that, under Article 46 of the Convention, both applicants must be released immediately from detention. This was a change from previous decisions. For example, in Mammadov v. Azerbaijan the Court was silent on individual remedies when finding an Article 5 violation in conjunction with Article 18. This remedial silence led to a protracted execution process before the CoM. Whilst the Committee decisions called for the release of the applicant in the light of the totality of the findings by the Court, the Azeri authorities argued that since no remedy was prescribed, they did not have an obligation to release Mammadov. This led to the first ever infringement proceedings before the European Court of Human Rights, where the Court stated that its original judgment did indeed require the release of the applicant. As is well known, Mammadov was released after the initiation of the infringement proceedings by the CoM, but before the Court decided on them.

Turkey's Conduct in the Execution Process: No Release of the Applicants

At the time of writing, neither Kavala nor Demirta# have been released. Turkey has, instead, put forward a novel argument, persistently maintaining in its communications to the CoM (see: here, here and here) that because the legal grounds for the continuing detention of the applicants changed after the judgments were delivered, the judgments were no longer capable of execution.

In the case of Kavala, Turkey argues that the applicant was acquitted in relation to the detention order reviewed by the Strasbourg Court. On the day of his release, he was detained anew on a separate charge. This, according to Turkey, makes it impossible to release Kavala because he is no longer subject to the detention order referred to in the Court's judgment. In the case of Demirta#, too, Turkey held that the reasons for continuing to deprive him of his liberty have changed several times and he is no longer detained for the reasons that were part of his case before the ECtHR. This, too, argues the Turkish government, makes the judgment 'impossible to execute' on grounds that it is in fact already executed.

The Committee of Ministers' Handling of the Execution of the Turkish Article 18 Cases

The core legal question before the Committee of Ministers in monitoring the implementation of these two judgments has been whether Turkey's arguments outlined above are within their scope or not. In both cases, the Committee of Ministers offers clear answers and, in so doing, significantly develops the remedial jurisprudence of Article 18.

There are three distinct ways in which these two cases developed the remedial jurisprudence of the CoM:

- through asking whether new legal reasons of detention concern **factual content already assessed by the Court** in Article 18 cases,
- through the continuous **review of domestic court decisions** with a view to establishing whether they take the Article 46 obligations of states to abide by the Convention in the light of established Article 18 violations into account,
- through the **expansion of Article 18 monitoring** not only to fresh detention orders, but also to convictions and prosecutions.

New Legal Grounds, but Same Factual Content Test

The CoM now employs a well-defined test in response to arguments of 'new legal grounds of deprivation of liberty making Article 5/18 judgments impossible to execute'. This test concerns asking whether the grounds for ongoing deprivations of liberty concern the same factual content earlier reviewed by the Court so as to constitute continuing violations under Article 18. For example in the case of Kavala, in its September 2020 decision and in the December 2020 interim resolution, the Committee of Ministers held that 'the information available to the Committee raises a strong presumption that his current detention is a continuation of the violations found by the Court'. In its June 2021 decision on Demirta#, the Committee of Ministers also held that 'the continuation of the applicant's pre-trial detention, on grounds pertaining to the same factual content, would entail a prolongation of the violation of

the applicant's rights as well as a breach of the obligation of the respondent State to abide by the Court's judgment.'

Article 18 Review of Domestic Judicial Decisions Concerning New Detention Orders

In both cases, fresh grounds of arbitrary deprivation of liberty have been reviewed and approved by domestic courts as lawful thus far. The CoM closely engages with these judicial decisions. It now holds that domestic judicial reviews of finding new legal grounds of detention as lawful cannot bring these cases outside of the scope of the Committee's review. The Committee reserves the right to review reasoned judgments from domestic courts to establish whether they are capable of bringing the case outside of the scope of Article 18 monitoring. The CoM stated this clearly in its June 2021 decision in the case of Kavala:

> 'The applicant has been detained continuously since 18 October 2017 and remains in detention as a consequence of the failure of the domestic courts to take into account the European Court's findings and the obligation of *restitutio in integrum* under Article 46 of the Convention, and that he is still pursued in criminal proceedings for charges which have been criticised by the European Court or are based on evidence found insufficient by that Court to justify his detention.'
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> 'the continuing arbitrary detention of the applicant, on the basis of proceedings which constitute a misuse of the criminal justice system, undertaken for the purpose of reducing him to silence, constitutes a flagrant breach of Turkey's obligation under Article 46 § 1 of the Convention to abide by the Court's judgment and is unacceptable in a State subject to the rule of law'.

In addition, the CoM clearly underlines the role of constitutional courts as core compliance partners in the execution of Article 18 judgments. This is seen in its assessment of the Turkish Constitutional Court's decision which found the new grounds of detention of Osman Kavala lawful in Aprtil 2021. In this case the Committee of Ministers specifically held that:

'The [Turkish] Constitutional Court's reasoned ruling finding the applicant's current detention lawful is based on the same evidence examined or referred to by the European Court, and concluded that the Constitutional Court's reasoning does not contain any indication to refute the above presumption of a continuing violation'.

Expansion of Monitoring from Post-Judgment Detentions to Prosecutions and Convictions

Finally, the CoM's remedial jurisprudence as developed by Kavala and Demirta# further shows that if applicants are detained for the same facts under new legal pretences, execution of the judgments requires the elimination of all the negative consequences of these new legal pretences on the applicants' enjoyment of Convention rights, be they new grounds for detentions or subsequent convictions.

This was clearly underlined in the June 2021 decision in the case of Demirta#. In this, the CoM stated that 'the obligation of *restitutio in integrum* calls for the negative consequences of the violation to be eliminated without delay, including as regards the two sets of proceedings pending before the Ankara Assize Court (concerning the thirty-four investigation reports and the events of 6-8 October 2014) and the appeal proceedings pending before the Istanbul Assize Court (against the applicant's conviction for disseminating propaganda in favour of a terrorist 4rganization during a meeting held in March 2013)'. In response to the news that one of Demirta#'s convictions was upheld by the Court of Cassation in April 2021, the CoM further noted that this case saw not only Article 5 and 18 violations, but also an Article 10 violation. The reasoning for extending monitoring of this case from detentions to convictions merits quoting in full:

> '…. The heart of the violation of Article 10 found by the Court was that the unprecedented, *ad homines* amendment of Article 83 § 2 of the Turkish Constitution on 20 May 2016 unforeseeably deprived the applicant of parliamentary inviolability in respect of statements he made as a member of Parliament; concluded therefore that the obligation to provide him with *restitutio in integrum* in respect of this violation requires the removal of all the negative consequences for the applicant's freedom of expression which resulted from the constitutional amendment, in particular the consequences of criminal prosecutions in respect of statements made by him which would otherwise have been protected under Article 83 § 2 of the Constitution;
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> …..called, therefore, for the applicant's immediate release, the quashing of his conviction by the Istanbul Assize Court, and termination of the criminal proceedings pending before the 22nd Ankara Assize Court, together with the removal of all other negative consequences of the constitutional amendment'.

What Now?

My analysis above shows that the Kavala and Demirta# cases have significantly developed the Committee of Ministers' remedy jurisprudence under Article 18 not only concerning situations where states furnish new legal grounds for deprivation of liberty of applicants but also as to the facts already reviewed by the ECtHR in its judgments as a whole. In cases where Article 5/18 violations are found, the CoM operates with a strong presumption that new detentions may indeed be continuations of original bad faith detentions. In turn, it requires domestic authorities (domestic and constitutional courts in particular) to show that the new grounds for detention rely on new facts – not the same set of facts already reviewed in Strasbourg. Finally, the CoM extends the purview of *restitutio in integrum* duties of domestic courts beyond quashing detention orders to quashing convictions or ending prosecutions to fully implement the spirit of ECtHR judgments.

Thus far, ongoing legal proceedings before Turkish domestic courts and the Constitutional Court have not substantively engaged with these three dimensions of Article 18 remedy jurisprudence. A central question, therefore, is what further action needs to be taken so that the Turkish courts take their Article 46 obligations seriously in the light of these Article 18 judgments and the remedy jurisprudence of the CoM?

In the case of Kavala, the September 2021 decision was a 'final warning'. The CoM has stated that if he is not released by 30 November 2021, the Committee of Ministers will give formal notification of infringement proceedings against Turkey in its December 2021 session. Whilst infringement proceedings, used only once against Azerbaijan, are generally seen as a major embarrassment and loss of reputation for Council of Europe member states, it is a slow process. The likely outcome of these proceedings is the ECtHR finding that Turkey is in violation of Article 46 of the Convention. If the notification of infringement proceedings is given in December 2021, there is also a risk that Mr. Kavala may continue to remain behind bars until the proceedings are complete. It is not likely that the ECtHR could say anything new in this case given that it has already called for Kavala's release in the light of the totality of its assessment of the violation of his Convention rights. If Kavala is kept behind bars, even after the decision of the Court, the CoM will have to decide if it will choose to opt for hard sanctions against Turkey, in the form of suspension of membership or expulsion.

In the case of Demirta#, a 'final warning resolution' is not yet in view – even if it is clear that this case, too, is heading in the same direction so long as the domestic authorities and courts continue to defend the same line of argument before the CoM and refuse to take the Grand Chamber judgment and the decisions of the CoM into account.

There is, of course, another way: that domestic courts take their constitutional obligations towards the ECHR and their Article 46 obligations seriously. To do this, they need to release and fully reinstitute the rights of these two applicants in accordance with being 'a State subject to the rule of law'.
